No. 22-14140

in the United States
Court of Appeals for the Eleventh Circuit

METAL CONVERSION TECHNOLOGIES, LLC,
Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

METAL CONVERSION TECHNOLOGIES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

September 7, 2023

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CERTIFICATE OF INTERESTED PERSONS

Petitioner Metal Conversion Technologies, LLC, discloses under Federal Rule of Appellate Procedure 26.1 that it has no parent corporation and no publicly held company owns more than 10% of its stock. Petitioner further certifies that the following is a complete list of interested persons as required by Eleventh Circuit Rule 26.1:

1. Metal Conversion Technologies, LLC, *Petitioner*
2. John Patterson, *President of Metal Conversion Technologies, LLC*
3. Sheng Li, *Counsel for Metal Conversion Technologies, LLC*
4. Kara Rollins, *Counsel for Metal Conversion Technologies, LLC*
5. Deitra Crawly, *Counsel for Metal Conversion Technologies, LLC*, *in the administrative proceeding before the U.S. Department of Transportation*
6. U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, *Respondent*
7. Peter Buttigieg, *Secretary of the U.S. Department of Transportation*
8. Tristan Brown, *Acting Administrator and Deputy Administrator of the Pipeline and Hazardous Materials Safety Administration*
9. Osasu Dorsey, *Chief Counsel of the Pipeline and Hazardous Materials Safety Administration*

10. Vasiliki Tasagnov, *Deputy Chief Counsel of the Pipeline and Hazardous Materials Safety Administration*
11. Howard McMillan, *Chief Safety Officer of the Pipeline and Hazardous Materials Safety Administration*
12. Joshua M. Salzman, *Counsel for Respondents*
13. Brad Hinselwood, *Counsel for Respondents*

No publicly traded company or corporation has an interest in the outcome of this petition.

Dated: September 7, 2023

/s/ Sheng Li
Sheng Li

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that:

(1) The panel decision conflicts with the United States Supreme Court's decision in *Boechler, P.C. v. Commissioner of Internal Revenue*, 142 S. Ct. 1493 (2022), that a non-jurisdictional statutory deadline is subject to equitable tolling unless the statute containing that deadline indicates Congress intended to foreclose tolling.

(2) The panel decision presents a question of exceptional importance because it improperly makes equitable tolling unavailable for all statutory deadlines for seeking judicial review of the order of an administrative agency. In doing so, it creates a conflict with authoritative circuit court decisions that recognize equitable tolling is generally available for statutory deadlines to petition for review of agency orders. *Culp v. Comm'r of Internal Revenue*, 75 F.4th 196 (3d Cir. 2023), and *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018). It also conflicts with circuit court decisions that recognize the statute of limitations under 28 U.S.C. § 2462 for agencies to seek judicial enforcement of their civil-penalty orders is subject to tolling. *United States v. Core Labs, Inc.,* 759 F.2d 480, 484 (5th Cir. 1985).

/s/ Sheng Li
Sheng Li

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STATEMENT OF JURISDICTION

This Court has jurisdiction under 49 U.S.C. § 5127 because this is a petition for review of the final action of the Department of Transportation.

STATEMENT OF THE ISSUES THAT MERIT EN BANC REVIEW

Petitioner Metal Conversion Technologies, LLC, ("MTC") seeks panel rehearing and rehearing en banc of a per curiam panel decision dismissing its petition for review under 49 U.S.C. § 5127 of a final agency order as untimely. *See* Panel Opinion (attached as Exhibit A). MTC sought equitable tolling of Section 5127's 60-day statute of limitations based on the agency's knowing concealment of the adjudicator's lack of authority to issue the challenged order.

The Panel held that Federal Rule of Appellate Procedure 26(b) establishes that Section 5127's statutory deadline is not subject to equitable tolling. Rehearing is warranted because the Panel's ruling conflicts with the Supreme Court's longstanding instruction that courts must presume Congress incorporates equitable tolling in each non-jurisdictional statutory deadline it enacts, including Section 5127's 60-day deadline. This presumption can be rebutted only if the text or structure *of the statute* containing the deadline indicates Congress did not intend equitable tolling to be available. Nothing in the text or structure of Section 5127 rebuts this presumption, and the Panel Opinion pointed to nothing in the statute's text or structure.

Rule 26(b) is not statutory. As a rule of procedure adopted by the federal courts in 1967, it cannot reflect congressional intent in enacting Section 5127 in 2005. It therefore cannot rebut the presumption that Congress intended Section

5127's statutory deadline to be subject to equitable tolling. Nor does Rule 26(b) purport to rebut that presumption. It merely prohibits extensions of certain deadlines "prescribed by these rules," meaning deadlines established by rules of procedure adopted by federal courts. Section 5127 exists outside of those rules because it was enacted by Congress.

The Panel's erroneous ruling reaches far beyond Section 5127 and would extinguish the possibility of equitable tolling for every statutory deadline for seeking judicial review (or enforcement) of an agency order. There are countless such statutes of limitations across the U.S. Code, and other circuits have found them to be subject to equitable tolling. In reaching the opposite conclusion here, the Panel Opinion would create a conflict with those other circuits, upend administrative law, and invite agencies to conceal unlawful conduct—such as an undisputed Appointments Clause violation—until the statute of limitations runs.

STATEMENT OF FACTS AND DISPOSITION OF CASE

In February 2020, the Department of Transportation ("DOT") charged MTC with allegedly violating Hazardous Materials Regulations. After an informal hearing, DOT assessed a civil penalty against MTC for the alleged violations. On December 14, 2021, MTC filed an administrative appeal to PHMSA's Chief Safety Officer ("CSO"), Harold McMillan.

On July 22, 2022, DOT revealed in an unrelated Sixth Circuit case that CSO McMillan was not properly appointed to adjudicate administrative proceedings by the President or Secretary, as required by *Lucia v. SEC*, 138 S. Ct. 2044 (2018). *See* Doc. 12-15 at 2 (Motion to Vacate and Remand, *Polyweave Packaging, Inc. v. DOT*, No. 21-4202 (6th Cir. July 22, 2022)); *see also Polyweave Packaging, Inc. v. DOT*, No. 21-4202, 2023 WL 1112247, at *1 (6th Cir. Jan. 27, 2023) ("The Department now concedes that the Chief Safety Office was not properly appointed at the time of the decision."). DOT apparently discovered the Appointments Clause defect in July 2022 and moved to vacate the civil-penalty order being challenged in *Polyweave. See id.* At the time, MTC's administrative appeal was pending before the improperly appointed CSO McMillan, who said nothing.

There was no practical way for MTC to have learned on its own about CSO McMillan's Appointments Clause violation—the agency itself did not know until July 2022. DOT did not notify MTC that CSO McMillan was improperly appointed even though he was then reviewing MTC's administrative appeal. *Id.* at 25. Nor did DOT provide MTC "what *Lucia* requires: an adjudication untainted by an Appointments Clause violation." *Cody v. Kijakazi*, 48 F.4th 956, 962 (9th Cir. 2022). Instead, DOT allowed the improperly appointed CSO McMillan to keep issuing final civil-penalty orders, including against MTC on July 25, 2023—just three days after

DOT asked the Sixth Circuit to vacate a civil-penalty order because of his improper appointment.

MTC did not learn of CSO McMillan's defective appointment until October 18, 2022, when one of Polyweave's attorneys reached out. *See* Doc 12-1 at 7-8. MTC thereafter engaged new counsel and filed a petition to review CSO McMillan's civil-penalty order on December 15, 2022. MTC sought equitable tolling of Section 5127's 60-day deadline on the ground that DOT knew the official presiding over MTC's administrative appeal was improperly appointed but concealed that blatant constitutional defect. Due to that misconduct, MTC was "unable to obtain vital information bearing on the existence of [its Appointments Clause] claim" until October 18, 2022. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). Tolling Section 5127's 60-day deadline to that discovery date would render MTC's December 15, 2022 filing timely.

The Panel asked the parties to address the timeliness of MTC's petition as a "Jurisdictional Question." Doc. 8-2. It answered that question in MTC's favor because it did not hold Section 5127 to be a *jurisdictional* bar. Nonetheless, the Panel held (without full briefing on non-jurisdictional issues) that Section 5127 is "not subject to tolling" because "the text of the rule precludes flexibility." Panel Opinion at 2. The Panel did not, however, cite any *statutory* text from Section 5127. Instead, it cited *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714-15 (2019), to conclude

that Federal Rule of Appellate Procedure 26(b), a procedural rule adopted by federal courts in 1967, provides a textual basis to exempt Section 5127's statutory deadline from equitable tolling. Panel Opinion at 2-3. Appellate Rule 26(b) states, "For good cause, the court may extend the time prescribed by these rules," but that "the court may not extend the time to file," among other things, "a petition to … review an order of an administrative agency, … unless specifically authorized by law."

SUMMARY OF ARGUMENT

The panel mistakenly relied on a procedural rule adopted by courts to conclude that a statutory deadline enacted by Congress is not subject to equitable tolling. The Supreme Court has repeatedly affirmed that Congress is presumed to legislate against a backdrop in which equitable tolling is freely available, most recently in *Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S. Ct. 1493, 1501 (2022). Thus, when Congress enacts a non-jurisdictional statute of limitations, it is presumed that equitable tolling is available. *Id.* This presumption is rebutted only if the text or structure *of the statute* indicates contrary congressional intent. *Id*. This Court has long recognized that non-jurisdictional claim-processing rules, like Section 5127, may be tolled. *Avila-Santoyo v. U.S. Atty. Gen*., 713 F.3d 1357, 1362 (11th Cir. 2013) (per curiam) (en banc) (holding 90-day deadline under Immigration and Naturalization Act to reopen a removal proceeding is subject to equitable tolling). The statutory text and structure guide whether equitable tolling is available.

Id. at 1362-64. The Panel's failure to engage with the language and structure of Section 5127 warrants reconsideration.

The Panel's reasoning is grounded in Federal Rule of Appellate Procedure 26(b), which is not a statute but a rule of court procedure. Congress did not enact it, and it says nothing regarding whether Congress intended a statutory deadline to be subject to equitable tolling. As such, Rule 26(b) cannot rebut the presumption that Congress intended Section 5127's 60-day deadline to be subject to equitable tolling.

The Panel's reliance on *Nutraceutical*, 139 S. Ct. at 714-15, is misplaced. That case held that Appellate Rule 26(b), a non-statutory procedural rule adopted by federal courts, supplied the textual basis to conclude that equitable tolling is not available for the deadline set by Civil Rule 23(f), another non-statutory procedural rule adopted by courts. *Id*. *Nutraceutical* does not, however, mean a *non-statutory procedural rule* adopted by courts may supply the textual basis to conclude that a *statutory deadline set by Congress* is not subject to equitable tolling. Only the text and structure of Section 5127 itself can rebut a presumption that Congress meant its 60-day deadline to be subject to equitable tolling. *See Boechler*, 142 S. Ct. at 1501.

The Panel's contrary holding demands rehearing because it conflicts with Supreme Court precedent establishing a presumption in favor of equitable tolling for statutory deadlines that only evidence of contrary *congressional* intent may rebut. *Id*. This Court has followed that instruction as recently as June 2023. *See NuVasive,*

Inc. v. Absolute Med., LLC, 71 F.4th 861, 874-85 (11th Cir. 2023) (following *Boechler* to affirm equitable tolling of three-month deadline under Federal Arbitration Act). The Panel's disregard of both the Supreme Court's and this Court's precedents commits an error whose ramifications reach far beyond Section 5127.

If left to stand, at the very least the mistaken decision would foreclose equitable tolling for all statutory filing deadlines to seek judicial review—or even enforcement—of agency orders. As such, it conflicts with other circuit courts that have held equitable tolling to be available for such statutory filing deadlines. *Culp v. Comm'r of Internal Revenue*, 75 F.4th 196, 205 (3d Cir. 2023) (holding 90-day deadline under 26 U.S.C. § 6213(a) to petition for review of IRS determination is subject to equitable tolling); *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 107 (2d Cir. 2018) (holding 59-day deadline under 49 U.S.C. § 32909(b) to petition for review of DOT's decision is "subject to equitable tolling"); *United States v. Core Labs, Inc.,* 759 F.2d 480, 484 (5th Cir. 1985) (holding five-year deadline to seek judicial enforcement of agency order under 28 U.S.C. § 2462 is subject to equitable tolling)

ARGUMENT

I. REHEARING IS NEEDED BECAUSE THE PANEL OPINION REJECTS SUPREME COURT PRECEDENT REGARDING WHEN A STATUTORY DEADLINE IS SUBJECT TO EQUITABLE TOLLING

A. The Supreme Court Has Made Clear that Non-Jurisdictional Statutory Deadlines Are Subject to Equitable Tolling Absent Clear Indicators of Contrary Congressional Intent

The Supreme Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), "sets out the framework for deciding the applicability of equitable tolling in suits against the Government." *United States v. Wong*, 575 U.S. 402, 407 (2015). "Equitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods." *Boechler*, 142 S. Ct. at 1500 (citation omitted). "Because [courts] do not understand Congress to alter that backdrop lightly, nonjurisdictional limitations periods are presumptively subject to equitable tolling." *Id.* (citing *Irwin*, 498 U.S. at 95-96). This presumption is "reinforced" when Congress enacted a deadline after *Irwin*, because it "was likely aware that courts" would interpret the relevant "timing provision" to "apply the presumption." *Holland v. Florida*, 560 U.S. 631, 645-46 (2010). A reinforced presumption applies here. The 60-day filing deadline at 49 U.S.C. § 5127 was enacted as part of the Safe, Accountable, Flexible Efficient Transportation Equity Act of 2005, Pub. L 109-59, title VII, § 7123(b), Aug. 10, 2005, 119 Stat. 1907.

"Congress, of course, may provide otherwise if it wishes to do so." *Irwin*, 498 U.S. at 96. For example, it can make a statute of limitations jurisdictional, but that "requires its own plain statement[.]" *Wong*, 575 U.S. at 420. On this point, the Supreme Court has "emphasized—repeatedly—that statutory limitation periods and other filing deadlines 'ordinarily are not jurisdictional' and that a particular time bar should be treated as jurisdictional 'only if Congress has "clearly stated" that it is.'" *Sec'y, DOL v. Preston*, 873 F.3d 877, 881 (11th Cir. 2017) (quoting *Musacchio v. United States*, 577 U.S. 237, 246 (2016)). Wisely, the Panel did not suggest that the 60-day filing deadline in 49 U.S.C. § 5127 is jurisdictional.

A non-jurisdictional statutory deadline such as the one found in Section 5127 is presumed to be subject to equitable tolling. *Boechler*, 142 S. Ct. at 1500-01. This presumption may be rebutted only if the statutory text or structure indicates that "Congress did not intend the 'equitable tolling' doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 354 (1997). Equitable tolling is available if such statutory indicators are not present. This principle applies to statutory deadlines for petitions to review an agency's decision. *Boechler*, 142 S. Ct. at 1501.

In *Boechler*, the IRS assessed tax penalties against a law firm and sought to collect through a levy on the firm's property. Boechler challenged the levy before IRS's Independent Office of Appeals, which upheld the levy. Boechler then filed in the Tax Court a petition to review IRS's administrative ruling but missed the 30-day

deadline under 26 U.S.C. § 6330(d)(1). The Eighth Circuit rejected Boechler's request for equitable tolling because it concluded the "filing deadline is jurisdictional and thus cannot be equitably tolled." *Id*. at 1497. The Supreme Court reversed. Because nothing in the statutory text or structure indicated that Congress intended to foreclose tolling, it held, "Section 6330(d)(1)'s 30-day time limit to file a petition for review of [the agency's] determination is an ordinary, nonjurisdictional deadline subject to equitable tolling." *Id*. at 1501. This Court recently followed *Boechler* to hold that the three-month deadline to seek vacatur of an award under the Federal Arbitration Act is subject to equitable tolling because nothing in the statute's text and structure suggested otherwise. *NuVasive*, 71 F.4th at 874-85.

The same conclusion obtains with respect to 49 U.S.C. § 5127's deadline to petition for review of DOT's administrative decisions at issue in this case. Nothing in Section 5127 indicates it is jurisdictional. Nor does its text or structure suggest that Congress intended to preclude equitable tolling. Section 5127's 60-day deadline is not written in "emphatic form." *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) (citation omitted). Nor does it set forth "limitations in a highly detailed technical manner," that "cannot easily be read as containing implicit exceptions." *See Brockamp*, 519 U.S. at 350. Nor does "the nature of the underlying subject" here result in equitable tolling creating "serious administrative problems" for the agency. *Id*. at 352 (declining to toll tax-collection deadline under 26 U.S.C. § 6511).

Section 5127 simply states that a person "may petition for review of the final action" in the courts of appeal "not more than 60 days after [an agency's] action becomes final." It is remarkably similar to Section 6330(d)(1) at issue in *Boechler*, which states that a person "may, within 30 days of [an agency's] determination under this section, petition the Tax Court for review[.]" 26 U.S.C. § 6330(d)(1). As such, Section 5127 is also an ordinary, non-jurisdictional deadline subject to equitable tolling. The Second Circuit recently confronted a nearly identically worded statutory deadline to petition for review of a different DOT agency's decision and readily concluded the 59-day deadline under 49 U.S.C. § 32909 "is subject to equitable tolling." *NRDC*, 894 F.3d at 107. The Panel's contrary reasoning here warrants rehearing.

B. Rule 26(b) Is a Procedural Rule that Cannot Rebut the Presumption that a Non-Jurisdictional Statutory Deadline Is Subject to Equitable Tolling

The Panel did not find Section 5127 to be jurisdictional. Nor did it identify anything in Section 5127's text or structure to rebut the presumption that its deadline is subject to equitable tolling. It instead relied on a procedural rule—Federal Rule of Appellate Procedure 26(b)—to conclude Section 5127 "precludes flexibility." Panel Opinion at 2-3. But the availability of equitable tolling is a question of *congressional* intent. *Boechler*, 142 S. Ct. at 1500; *Brockamp*, 519 U.S. at 354; *Irwin*, 498 U.S. at 95-96. The Federal Rules of Appellate Procedure are not relevant to that question.

Rule 26(b) is a rule of procedure adopted by the federal courts in 1967 under the Rules Enabling Act to self-govern, *see* 28 U.S.C. § 2071, and it has not been amended since. Congress did not delegate—and indeed could not have delegated—power to federal courts to adopt procedural rules that affect the substantive meaning of Section 5127 or any other legislation. *Cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested"). Hence, Rule 26(b) says nothing about whether the *statutory* deadline at Section 5127 is subject to tolling. Because equitable tolling is "a background principle against which Congress drafts limitations periods," *Boechler*, 142 S. Ct. at 1500 (citation omitted), "nonjurisdictional limitations periods are presumptively subject to equitable tolling." *Id.* "The presumption is rebutted if 'there [is] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply.'" *Arellano v. McDonough*, 598 U.S. 1, 7 (2023) (quoting *Brockamp*, 519 U.S. at 350) (emphasis in original). A procedural rule adopted by the federal courts cannot displace the default presumption of congressional intent to make tolling available.

The Panel's reliance on *Nutraceutical*, 139 S. Ct. at 714-15, cited at Panel Opinion at 2-3, is misplaced. That case concerned whether Federal Rule of Civil Procedure 23(f)'s 14-day deadline to appeal a denial of class certification is subject to equitable tolling. *Id*. at 713. Importantly, the Court emphasized that the 14-day

deadline there "is found in a procedural rule, not a statute." *Id*. at 714. Hence, it was appropriate in *Nutraceutical* to rely on Appellate Rule 26(b), another procedural rule that "single[s] out Civil Rule 23(f) for inflexible treatment," to conclude the deadline is not subject to tolling. *Id*. at 715. By contrast, Appellate Rule 26(b) does not and cannot "single out" Section 5127 for inflexible treatment because a procedural rule adopted by the Supreme Court in 1967 says nothing about whether Congress incorporated *Irwin*'s background presumption in favor of equitable tolling when it enacted Section 5127 in 2005.

Nor does Appellate Rule 26(b)'s text purport to affect statutory deadlines. It first states that "[f]or good cause, the court may extend the time prescribed *by these rules*," thus limiting its reach to deadlines established by the court's procedural rules. Fed. R. App. P. 26(b) (emphasis added). It then provides an express caveat to this power: "But the court may not extend the time to file," among other things, "a petition to … review an order of an administrative agency … unless specifically authorized by law." Fed. R. App. P. 26(b)(2). Because the power to extend reaches only deadlines "prescribed by these rules," the caveat to that power is likewise limited to those deadlines. *Id.* The 60-day deadline under Section 5127 is not "prescribed by these rules" but rather was enacted by Congress. The procedural rules do not authorize the extension of any deadline enacted by Congress. By the same

token, neither can they bar the tolling of any such deadlines—certainly not when Congress intended (as courts must presume) tolling to be available.

At bottom, the question is whether Congress intended Section 5127 to be subject to equitable tolling. As with any other questions of statutory interpretation, the answer lies in the text and structure of the statute. Here, Section 5127 contains nothing to rebut the presumption that tolling is available. MTC has not found a single prior case in which a court relied solely on Rule 26(b) to determine whether a *statutory* deadline for seeking judicial review of an agency order is subject to equitable tolling. This Court should not be the first.

II. REHEARING IS NEEDED BECAUSE THE PANEL OPINION CREATES A CIRCUIT SPLIT AND UPENDS ADMINISTRATIVE LAW BY PRECLUDING TOLLING OF *EVERY* STATUTORY DEADLINE FOR SEEKING JUDICIAL REVIEW OF AGENCY ACTIONS

The Panel's conclusion that Rule 26(b) precludes equitable tolling of Section 5127's deadline is not limited to that statute. Rather, if allowed to stand, the Panel's decision would preclude tolling of *all* statutory filing deadlines for "petition[s] to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission or officer[.]" Fed. R. App. P. 26(b)(2).

Countless statutes provide for judicial review of agency orders, provided that a petitioner files within a congressionally enacted deadline. *See, e.g.*, 15 U.S.C. §§ 45(c) (60-day deadline for petition to review FTC orders); 78y(a)(1) (60-day deadline for petition to review SEC orders); 29 U.S.C. § 660(a) (60-day deadline for

petition to review Occupational Safety and Health Review Commission orders); 49 U.S.C. § 521(b)(9) (30-day deadline for petition to review Federal Motor Carrier Safety Administration orders). And, of course, the Administrative Procedure Act ("APA") incorporates 28 U.S.C. § 2401(a)'s generally applicable six-year statute of limitations for seeking judicial review of agency orders. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1280 (11th Cir. 2007).

Courts have consistently held that statutes of limitations for seeking judicial review of agency orders are subject to equitable tolling as long as the statutory text and structure do not preclude tolling. Recently, the Supreme Court held a statutory 30-day deadline under 26 U.S.C. § 6330(d)(1) to petition for review of an IRS determination of a tax levy is subject to tolling. *Boechler*, 142 S. Ct. at 1501. Lower courts follow that approach to determine the availability of equitable tolling of filing deadlines for judicial review of agency decisions. *See, e.g., Culp*, 75 F.4th at 205 (holding 90-day deadline under 26 U.S.C. § 6213(a) to petition for review of IRS determination "is subject to equitable tolling"); *NRDC*, 894 F.3d at 107 (holding 59-day deadline under 49 U.S.C. § 32909(b) to petition for review of DOT's decision "is subject to equitable tolling"); *Joseph v. United States*, 505 F. Supp. 3d 977, 981 (N.D. Cal. 2020) (tolling 30-day deadline under 7 U.S.C. § 2023(a)(13) for judicial review of agency decision disqualifying food store from food-stamp program). The default six-year deadline to challenge agency orders under the APA is likewise

subject to equitable tolling because the statutory text "leaves room for such flexibility" and does not "show a clear intent to preclude tolling." *DeSuze v. Ammon*, 990 F.3d 264, 271 (2d Cir. 2021) (quoting *Nutraceutical*, 139 S.Ct. at 714)).

According to the Panel's reasoning, these decisions, including the Supreme Court's holding in *Boechler*, are all wrong. If Rule 26(b) prohibits equitable tolling of Section 5127's deadline to petition for review of an agency order, then it would likewise prohibit the tolling of every other statutory deadline governing "petition[s] to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency[.]" Fed. R. App. P. 26(b)(2). Such reasoning would also preclude agencies from tolling the five-year statute of limitations under 28 U.S.C. § 2462 to seek judicial *enforcement* of their civil-penalty orders, creating yet another circuit split. *See Core Labs,* 759 F.2d at 484 ("The government may, however, be entitled to invoke the equitable powers of the Court to toll the § 2462 limitations period in this case."); *cf. FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) ("section 2462 is subject to equitable tolling"); *SEC v. Fowler*, 6 F.4th 255, 262 (2d Cir. 2021) (same).

This Court would stand alone in categorically rejecting equitable tolling for all statutory deadlines for seeking review or enforcement of agency orders. In addition to generating circuit splits, such an outcome would upend administrative

law and invite the very type of agency misconduct raised by this case, *i.e.*, concealing a constitutional defect in an agency order until the statute of limitations has run.

CONCLUSION

Petitioner respectfully requests that the Court grant panel rehearing or rehearing en banc.

Respectfully submitted,

September 7, 2023

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,899 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Eleventh Circuit Local Rule 35-1.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office365 Times New Roman 14-point font.

Date: September 7, 2023

/s/ Sheng Li
Sheng Li

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that I have appended hereto a copy of the opinion sought to be reheard.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 7, 2023.

New Civil Liberties Alliance

/s/ Sheng Li
Sheng Li

Attorney for Petitioner